IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR

M/s. Hema Construction Vs. The State of Rajasthan & ors.

D.B.SPECIAL APPEAL (WRIT) NO.11/2005
Against the order dated 14.12.2004 passed by the learned Single Judge in S.B.Civil Writ Petition No.5649/2004.

Date of order : 14th January, 2005

PRESENT

HON'BLE MR.JUSTICE H.R.PANWAR

HON'BLE MR.JUSTICE DINESH MAHESHWARI

Mr.Shreedhar Purohit, for the appellant

BY THE COURT: (Per Hon'ble Maheshwari,J.)

Heard learned counsel for the appellant.

This appeal is directed against the order dated 14.12.2004 passed by the learned Single Judge in Writ Petition No.5649/2004 whereby the learned Judge found the writ petition filed by the petitioner – appellant in a contractual matter involving disputed questions of fact and therefore declined writ jurisdiction.

The appellant-petitioner, registered "AA" Class Contractor was awarded the work of "Construction and Upgradation of Missing Link from Bhiluda to Saroda Road KM. 3/500 to 8/500 and 10/500 to 15/500" amounting to Rs.88,95,991.00 at the negotiated rates of 9% above G-Schedule Rates. Acceptance of the tender was conveyed on behalf of the Governor of the State of Rajasthan to the petitioner by the work order dated 5.2.2004 (Annex.P/3)

stating inter alia the stipulated date of commencement of work as 15.2.2004 and the stipulated date of completion as 14.9.2004 and that the contract clauses "Conditions of Contract" R.P.W.A. 100 including tender documents shall form part of agreement and treated as executed between the petitioner and the Governor of State of Rajasthan as Agreement No.159 of the year 2003-2004.

It was alleged by the petitioner that although the date of commencement of work was 15.2.2004 but as the layout plan of the work could not be supplied by the Assistant Engineer Incharge, the work was not executed till 29.2.2004, and according to the petitioner, the work was further hindered on account of a legal ban of the Election Commission which came in force on 29.2.2004 due to ensuing Lok Sabha elections. The petitioner has placed on record the order issued by the District Election Officer, Dungarpur dated 12.3.2004 as Annex.P/5 which stated that in view of the Code of Conduct being in force from 29.2.2004 till completion of the election process, no administrative/technical and financial sanction be issued for any work/project under any scheme of the Central and the State Governments; that the work which have been commenced at the site before 29.2.2004 may be continued and the amount in respect thereof could be released; that the work which have been sanctioned before 29.2.2004 but not commenced at the site, such work would not be started till completion of election process nor amount be released; and that the amount could be released for payment towards the work which have been completed after the concerned officer has satisfied himself. The petitioner contended that the ban imposed by the Election Commission continued upto 26.5.2004 and as such the delay was caused in execution of the work for the reasons not attributable to the petitioner, but still a

show cause notice under clause (2) of the contract conditions was issued on 1.5.2004, although no contract was executed by this date. As per this notice (Annex.P/6), it has been given out by the Executive Engineer, PWD, Division Sagwara that the petitioner has executed the work of Rs. "NIL" by the end of 30.4.2004, although as a matter of fact, the petitioner should have executed the work of about Rs.22,44,979/-. The petitioner was called upon to take immediate steps to improve the progress of the work and if no satisfactory arrangement would be made within seven days from the date of the issue of the notice so as to ensure completion of work within stipulated time, then action under clause (2) of the Contract Agreement would be taken. It was further contended that the Superintending Engineer did not care to see that the contract was executed as late as on 10.6.2004 and the petitioner was punished with the order dated 15.7.2004 by withdrawing the contract in terms of Clause-32 of the Agreement. The order dated 15.7.2004 has been placed on record as Annex.7 in which the Superintending Engineer,PWD Circle, Banswara has stated that despite repeated notices issued by the Officer-incharge of the work vide his letters dated 24.4.2004, 14.6.2004, 15.3.2004 and 1.5.2004 and by the Office of the Superintending Engineer dated 19.5.2004, the petitioner has neither improved the quality of the work done nor improved the progress of the work and nil work has been executed in five months. In view thereof, the balance work under the agreement was withdrawn from the petitioner and the contract was rescinded under Clause 32 of the Agreement. In exercise of powers under Clause-2 of the Agreement, the Superintending Engineer further ordered full compensation to be levied upon the petitioner and remaining work to be got completed by adopting the course as mentioned in clause 3(c) of the Agreement. According to the petitioner, he

submitted a representation against this order of the Superintending Engineer dated 15.7.2004, a copy whereof has been placed on record as Annex.P/8. We have noticed that in this representation (Annex.P/8), the petitioner has no-where stated that lay out at the site was not given for which the work could not be completed, but on the contrary has asserted that he has made all arrangements for the work when the election code of conduct came into force, for which the work could not be started and that the work was started on 26th May and that the petitioner has carried out the work of gravel in 5 Kms. and C.D. Works and other works including earth work were also completed. This letter of the petitioner shows that petitioner was raising certain objections and complaints against the Executive Engineer and according to the petitioner, it was on account of his complaints that the proceedings have been taken against him. The petitioner has claimed that he has executed a work about Rs.14 lacs of which the payment was due and that the work was obstructed for six months and he may be given 3 ½ months' extra time for completing the work. According to the petitioner, this representation was ignored and the respondents proceeded to issue fresh tenders for the same work after deducting the work which was completed by the petitioner on 2.8.2004.

From the narration of facts by the petitioner, it also appears that the petitioner filed a suit for injunction for restraining the respondents from granting the said work to any other contractor and the prayer for grant of temporary injunction was refused by the trial court on 25.9.2004. Civil Misc.Appeal No.1557/2004 against the order dated 25.9.2004 has also been dismissed by this Court on 19.10.2004. The petitioner has chosen not to place on record the orders

dated 25.9.2004 and 19.10.2004. Be that as it may, the petitioner has averred in the writ petition that he has not been paid any amount for which the work was executed by him and the work has been allotted to M/s.Maya Construction at the rate 5% above BSR (Basic Schedule of Rates).

According to the petitioner, there was no loss to the respondents; the payment has not been made to him of the work done and on the contrary 10% penalty has been imposed amounting to Rs.8,89,599/-under the letter dated 6.11.2004 (Annex.11). A perusal of this letter shows that towards the work done by the petitioner, a bill of Rs.2,89,900/- was sanctioned and after adjusting other amounts, a sum of Rs.88,024/- remained due and the petitioner was called upon to make payment within seven days. The petitioner submitted the writ petition with the cause that being aggrieved of the order of penalty (Annex.11), he served a notice through his lawyer dated 18.11.2004 (Annex.12) and the respondents did not act upon the notice. The petitioner prayed for quashing of the orders dated 1.5.2004, 15.7.2004 and 6.11.2004 and for directions for making payment for the work done by him.

The learned Single Judge of this Court while considering the writ petition noted the contentions of the petitioner that respondents have not suffered any loss and that penalty of 10% was the maximum penalty provided in the contract and not required to be imposed invariably in every case. After going through the facts of the case, the learned Single Judge found that the petitioner has raised several disputed questions of fact like as to whether the petitioner was guilty for not completing the contract in time, whether he was entitled for extension of time,

whether respondents were equally responsible for the delay and whether respondents suffered any loss or damage and what should be the penalty for not completing the work in time. The learned Judge found that these facts cannot be determined in writ jurisdiction, and therefore, declining to interfere under Article 226 of the Constitution of India, dismissed the writ petition in limine by the order dated 14.12.2004 which has been challenged in this appeal.

Learned counsel for the appellant has laid emphasis on the submission that learned Single Judge erred in not considering undisputed fact that the contract required to be executed in accordance with Article 299 of the Constitution of India was executed on 10.6.2004, whereas show cause notice to terminate the contract was issued even prior to this date i.e. on 1.5.2004 which shows prejudice and predisposed mind of the respondents. Learned counsel has also contended that the maximum penalty of 10% has been imposed without affording any opportunity of hearing to the petitioner and deserves to be quashed on this count also.

Having given our thoughtful consideration to the submissions and having perused the record, we are satisfied that present one is clearly a case of contractual disputes and for determination of such disputes, the writ court is not the proper forum. The dispute arises out of a contract between the petitioner and the respondents for execution of road work as aforesaid, and there is apparently a serious dispute about the responsibility for the breach of contract and resultant liability. The determination of this dispute essentially requires determination of

the questions of fact about the responsibility for the delay, the amount of work done, the loss if any suffered by the respondents and the quantification of the amount of penalty. The dispute of the present nature cannot be determined in the writ jurisdiction of this Court. We have examined the record of the case and stand sought to be taken by the petitioner regarding delay in execution of the work, but in view of the fact that we are satisfied that in this contractual matter, writ jurisdiction of this Court has rightly been declined, we are not making any observation or recording any finding in respect of the allegations of petitioner and would leave the petitioner to take recourse to appropriate remedy in accordance with law.

Apart from the reasonings that the present one is a matter of contractual disputes and involves disputed questions of fact, there is yet another reason for which, in our opinion, the writ jurisdiction deserves to be declined. We find from the Conditions of Contract (Annex.4) that specifically a Standing Committee for settlement of dispute has been provided under Clause 23 which reads as under:-

> "Clause 23: Standing Committee for Settlement of disputes:
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> If any question, difference or objection, whatsoever shall arise in any way, in connection with or arising out of this instrument, or the meaning of operation of any part thereof, or the rights, duties or liabilities of either party then, save in. so far, as the decision of any such matter, as herein before provided for, and been so decided, every such matter constituting a total claim of Rs.50,000/- or above, whether its decision has been otherwise provided for and whether it has been finally decided accordingly, or whether the contract should be terminated, or has been rightly terminated and as regards the rights or obligations of the parties, as the result of such termination, shall be referred for decision to the empowered Standing Committee, which would consist of the followings

(i) Administrative Secretary concerned.
(ii)Finance Secretary or his nominee, not below the rank of Deputy Secretary and/or Chief Accounts officer
(iii)Law Secretary or his nominee, not below the rank of Joint Legal Remembrancer.
(iv)Chief Engineer-cum-Addi. Secretary of the concerned department
(v)Chief Engineer concerned (Member-Secretary)

The Engineer-in-charge, on receipt of application along with nonrefundable prescribed fee, (the fee would be two per cent of the amount in dispute, not exceeding Rs.1 lac) from the Contractor, shall refer the disputes to the committee within a period of one month from the date of receipt of application.

Procedure and Application for referring cases for settlement by the Standing Committee shall be, as given in Form RPWA 90."

The parties having specifically provided for alternative disputes redressal forum for settlement of the disputes, there is no reason for the petitioner not following and adopting that remedy. We may point out that the applicability and operation of Clause 23 of the Agreement has been precisely in the knowledge of the petitioner even while attempting to invoke the writ jurisdiction of this Court inasmuch as in the notice dated 18.11.2004 served through the counsel (Annex.12), it has been specifically stated,-

"However, the applicant is ready if his due payment for the work executed by him is made to him and the controversy settled by the arbitration committee in terms of clause 23 of the agreement for which the communication should be sent to the applicant within a week's time."

In the aforesaid view of the matter, we are clearly of the opinion that the remedy by way of writ petition is ill-conceived and the writ petition has rightly been rejected.

We would have left the matter here only leaving the petitioner to avail the appropriate remedy but the learned counsel for the appellant submitted that the objection against the notice dated 1.5.2004 that the same was issued prior to execution of contract in accordance with Article 299 of the Constitution of India does not relate to any disputed question of fact and the same deserves to be considered in the writ jurisdiction. In this regard, suffice is to state that the contention of the learned counsel for the petitioner on the anvil of Article 299 of the Constitution of India is fundamentlly baseless and deserves to be rejected. The acceptance letter (work order) dated 5.2.2004 specifically conveys the acceptance of the offer of the petitioner on behalf of the Governor of State of Rajasthan and that the conditions of contract including the tender documents would form the part of the contract and treated as executed between the contractor and the Governor of State of Rajasthan under Agreement No.159 of the year 2003-2004. The contract in question was completed on 5.2.2004 with the acceptance letter (Annex.P/3) in sufficient compliance of the requirements of Article 299 of the Constitution of India. Merely because the petitioner contends to have put his signatures on the conditions of contract on 10.6.2004 is hardly of any effect. According to the own showing of the petitioner, even before this alleged date of 10.6.2004, he has already received the communication of the acceptance and even made preparation of the work before enforcement of the Election Code of Conduct and afterwards started the work on 26th May, 2004 (vide Annex.P/8). A binding contract between the petitioner and the Governor of State of Rajasthan has already come into existence in direct compliance of the Article 299 of the Constitution of India. The unilateral act of the petitioner choosing to put his signatures allegedly on 10.6.2004 on the conditions of contract cannot in any

manner affect the existence of contract as on 5.2.2004 between the petitioner and the State of Rajasthan.

Learned counsel for the petitioner has referred to a decision of the Hon'ble Supreme Court in the case of State of Uttar Pradesh Vs. Kishori Lal Minocha (AIR 1980 SC 680) to contend that no concluded contract came into existence. In the said case of Kishori Lal, the respondent offered bid of Rs.73,000/- and Rs.48,000/- as fees for two group of country liquor shops at the annual excise auction for the year 1951-52 for Faizabad District but did not deposit 1/6th of the amount on conclusion of the sales as required under the Excise Rules for which two groups of shops were sold again and the resale price fetched the amount of Rs.65,700 and Rs.35,200/- respectively for the two groups, and therefore, State of Uttar Pradesh contended to have suffered a loss of Rs.20,100/-. The Hon'ble Supreme Court found that clause of Rule 357 authorising the Government to recover the difference of the sale price from the defaulter was not published in the official gazette and it was held that there was no law under which the respondents could be asked to make amends in the short-fall because Section 77 of the UP Excise Act required all rules or notifications to be published in official gazette and to have effect as if enacted in the Act from the date of the publication or from such other dates as may be specified. The Hon'ble Apex Court thereafter considered the question that even if there was no statutory provision whether there was a concluded contract between the parties under which the respondent was liable to pay the difference of the price? The Hon'ble Court found from the second clause of Rule 357 that in absence of final sanction of the Excise Commissioner, the bid cannot be said to have been finally accepted, and

therefore, there was no concluded contract between the parties to make the respondent liable for the alleged loss. Having examined the facts of the present case, we are clearly of the opinion that the ratio of the said case in Kishori Lal (supra) has no application whatsoever to the facts of the present case inasmuch as in the said case, it was concluded on the facts by the majority of their Lordships of the Hon'ble Supreme Court that for want of sanction by the Excise Commissioner, there was no concluded contract between the parties particularly because Rule 357 (2) of the UP Excise Manual provides for sanction of the Excise Commissioner of the final acceptance. The present one is not a case of any allegation of want of authority with the concerned Engineer who accepted and conveyed acceptance of the offer of the petitioner. The acceptance by the Superintending Engineer under No.7265 dated 31.1.2004 on behalf of the Governor of State of Rajasthan has been conveyed by the Executive Engineer on behalf of the Governor of State of Rajasthan. The requirements of Article 299 (1) of the Constitution of India are that all the contracts made in exercise of executive powers of the Union or of a State are required to be expressed to be made by the President or by the Governor of the State and all such contracts are required to be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise. We have already noted that there is no allegation of want of authority with the concerned Engineer. When the acceptance has been made on behalf of the Governor of the State of Rajasthan and has been conveyed on behalf of the Governor and the letter of acceptance has been signed by the Executive Engineer on behalf of the Governor of the State of Rajasthan, the requirements of Article 299(1) are clearly satisfied. The letter of acceptance (Annex.P/3) itself states that the contract clauses “Conditions of Contract” RPWA 100 including

tender documents shall form part of agreement and treated as executed between contractor and the Governor of State of Rajasthan. The petitioner himself has alleged to have made preparation in terms of the letter of acceptance and even to have commenced the work allegedly on 26.5.2004. Merely because the petitioner alleges that he chose to put his own signatures on the contract conditions on 10.6.2004 only is of no avail nor of any relevance so far the requirements of Article 299(1) of the Constitution are concerned. That being the position, we are clearly of the opinion that the contention of the petitioner against the notice dated 1.5.2004 on the ground that he put signatures on the contract conditions on 10.6.2004 cannot be countenanced and the same is rejected.

As a result of the aforesaid, we find no ground for interference in this appeal. The appeal therefore, fails and is dismissed.

(DINESH MAHESHWARI),J. (H.R.PANWAR),J.

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